SUPREME COURT, U. S.
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NO. 424

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner

v.

GULF COAST RICE MILLS, *Respondent*

BRIEF IN REPLY TO MOTION TO DISMISS

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BRIEF IN REPLY TO MOTION TO DISMISS

I. The Federal questions, raised for the first time in Petitioner's Motion For Rehearing in the Appellate Court below, were timely presented under the exception to the general rule.

Petitioner relies wholly upon the exception to the general rule as to timeliness of raising the federal questions, as it is stated in *Herndon v. Georgia*, 55 S. Ct. 794, 295 U.S. 441, 79 L.Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U.S. 661, 80 L. Ed. 471. The majority opinion there states that a federal claim is made timely "if the ruling of the

state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." Mr. Justice Cardozo in his dissent indicates (at 295 U.S. 447, 79 L. Ed. 1535) that the exception applies "when a constitutional privilege or immunity has been *denied for the first time* by a ruling made upon appeal," because it is then that the complaining litigant can be expected to be "thus surprised."

In the case at bar, no unconstitutional deprivation of rights ever occurred for which Petitioner had cause to complain until the state appellate court issued its written opinion. No governmental agency had issued any order to Petitioner, no governmental intrusion had occurred as against Petitioner by any administrative action, and this lawsuit bore no resemblance to the usual suit in which a government seeks to enjoin compliance with its statutes. The mere pleadings of the Respondent, alleging an undesignated number of violations of some seventy-odd sections of the Federal Food & Drug Act and several sections of local food laws (by pleading inconsistently in the alternative), intermingled with an equal number of allegations having nothing to do with governmental regulations of any kind, did not deprive Petitioner of any constitutional right. The immunity herein claimed is immunity from local food laws which, *as later construed*, conflict with federal regulations in a federally pre-empted area; the privilege claimed is that of relying upon the sanctions of such federal law. No ruling or order had ever been issued in the trial court, or previously, which the Petitioner could have challenged under the Constitution. Petitioner's rights were "denied for the first time by a ruling made upon appeal."

This denial of rights could not reasonably have been anticipated. Two specific circumstances set this case apart from ordinary cases of governmental intrusion upon private rights, and caused Petitioner justifiably to anticipate (at worst) a ruling exactly opposite to that which is challenged by this appeal. First, the only violation of pesticide "tolerance" statutes found by the Houston appellate court was the violation of Section 346 as embodied in Section 342(a)(2) of the federal act, whereas the only violation of a pesticide "tolerance" statute *alleged* by Respondent was that of Section 346(*a*) as embodied in Section 342(a)(2) (*B*) of such Act; see Plaintiff's Third Amended Original Petition, subparagraphs 8 and 9 of paragraph III (Transcript Vol. I, pp. 2-4). Secondly, upon the first appeal of this case the Waco Court of Civil Appeals had explicitly ruled against respondent on this precise contention *as a matter of law*, upon the identical allegations of respondent, holding that there were no violations proven as alleged.

1. The ruling at issue was unanticipated because of the pleadings and evidence:

Respondent alleged in the most general terms, in subparagraphs 10-17, violations of "Sec. 301, et seq." of the federal act, in connection with five sections which prohibited the sale of this food.

Only two specific violations were alleged, these being in subparagraphs 7, 8 and 9 of Paragraph III of the petition. Subparagraph 7 alleged the "injurious to health" provision of the federal act. Subparagraphs 8 and 9 both alleged the "tolerance" provision of the federal act, Section 346a(*a*), and thereby it was urged in effect that the rice was a "raw" agricultural commodity adulterated by reason of the pres-

ence of a pesticide which was either prohibited or was present in amounts exceeding its tolerance.

The Waco court, on the first appeal, ruled that the rice was not a "raw" commodity and that these sections had no applicability to the case alleged, and that no violations were proven.

The second trial was had upon these identical pleadings. The respondent even persisted in introducing evidence to prove (contrary to the Waco court's legal opinion) that the rice was a "raw" commodity; the Director of the state food and drug department testified that the rice was a "raw" commodity and that he would have condemned and seized it because it had no tolerance allowed for Lindane (S.F. 298-299). These pleadings and evidence thereby confronted petitioner with only a single tolerance statute—the federal "raw agricultural commodity" section—which petitioner might have challegend hypothetically as being unconstitutional *if* it were to be construed by the trial and/or appellate court favorably to respondent's contentions. But even if such a federal question had been raised by petitioner's pleadings, or by objections to such evidence, it would now be utterly worthless and immaterial to this appeal because the ruling of the Houston appellate court was that such Section 346*a* was *not* violated but that an entirely different violation was proven, to wit: violation of Section 346—which had not even been alleged!

Clearly, *if* petitioner should have raised questions in the trial court as to the validity of any of the myriad of statutes alleged, it would have been a question only as to the applicability of the "raw" commodity provisions to the processed rice. It is inconceivable that the law placed upon Petitioner the burden of conjuring up every pos-

sible question as to the validity of every portion of every section alleged as "Sec. 301, et seq.". This would not be an "opportunity" to raise federal claims, but an endless and impossible burden of pleading and objecting.

2. The ruling at issue was not to be reasonably anticipated in view of the earlier opinion by the Waco court:

The Waco court had ruled that no violations of any kind had occurred under "the record before us." That record included the same essential facts that comprise the essence of the Houston court's ruling to the contrary, namely the fact that there was Lindane in the rice in quantities ranging "from *none* up to 3.6 parts of Lindane per million parts of rice."

Respondent argues that the record was "substantially" different in the second trial. Petitioner must concede that this was true in the respect that the *evidence* adduced differed enough that the Houston court was not bound by the doctrine of the "law of the case". But if only the *evidence* was different, while the Respondent chose to put Petitioner to trial upon the same *pleadings* as were used in the first trial, *when* was Petitioner expected to begin anticipating a different application of the food statutes? If the Waco court rulings could have been expected to afford any guidance at all, Petitioner surely was justified in going into the second trial without a thought of raising a federal question as to Respondent's *pleadings;* they were the same as those before the Waco court, and all contentions therein had been overruled as to "violations" upon which the tort case was based—the case had been remanded for re-trial only because "there were numerous disputed factual issues in the contract and breach of warranty phases of the case" (see Waco court opinion, page 47,

JURISDICTIONAL STATEMENT). In proceeding to trial, it would have been unthinkable to raise objections to each item of *evidence*, throughout the lengthy trial, in which virtually all evidence pertained in some way to the alleged violations of law.

The final rulings, now appealed from, were that the Lindane was prohibited because (1) it was not a "required" poison under Section 346 and (2) its presence in any amount may have rendered the rice injurious to health under Section 342(a)(1). It is utterly impossible to find in the record any ruling by the second trial court which could have been understood to be a ruling on either of these two points, especially in the face of the previous rulings of the Waco court. The only rulings made in the trial court would be comprised in whatever could reasonably have been understood to be "implied" in its jury charge. But can it now be said that the trial court "implied" a ruling in his charge to the effect that the evidence proved a violation of Section 346? This cannot be true unless the charge contained implied findings of violations of *every statute alleged* for which support could be found in the evidence, and particularly the "raw" commodity statute, Section 346a. The latter hypothesis is impossible because such statutes were alleged only in the alternative and inconsistently.

The verdict having come in upon the jury charge, and both the verdict and the charge in the second trial being substantially like those in the first, there still remained no fair "opportunity" to raise a specific federal question, because no conclusion of law or other legal ruling was handed down which would deny a constitutional right. As respondent correctly states in its Motion to Dismiss (at

page 19), the trial court had simply "found evidence supporting this verdict" by his submitting the issue to the jury and entering judgment thereon. The verdict was merely a finding that Petitioner had been *negligent*. This negligence may have been found upon the basis of a violation of any one of some *eighty* statutes—or violations of many of these, or of none at all. Obviously, Petitioner could not have known of what statutory violation, if any, it had been found guilty, and thus could not assert any particular federal immunity or privilege.

II. The Federal questions are substantial.

Statements having no support in the record are made by Respondent in this connection on pages 8-9 of its MOTION TO DISMISS, and should be disregarded. These statements are: (1) that the occurrence made the basis of this suit "was a single, isolated episode in 1955"; and (2) that the Petitioner "only once used the poison Lindane on milled rice and has not used it again since 1955."

The record only shows that Lindane has not been used *at the Gulf Coast Rice Mill* during such periods. As to whether it has been used elsewhere and is in general use *elsewhere*, is not found in testimony in the record.

That *all* chlorinated hydrocarbons, including all benzene hexachloride and *especially* Lindane, are in general use throughout the Nation is the only reasonable inference to be drawn from the fact that the Federal Food & Drug Administration has seen fit to list these pesticides, in Section 3.41 of Title 21, C.F.R., among the many chemicals which are sanctioned for use in "raw" agricultural commodities. Lindane is thus encouraged by the Administra-

tion to be extent that pursuant to Section 120.1(f) of Title 21, C.F.R., it may be so used even if its residue remains on such food after processing and "when ready to eat."

III. The judgment below does not rest upon an adequate non-Federal basis.

The judgment below is rested upon the basis that the use of Lindane violated state and city laws as well as federal statutes, as Respondent recognizes in pages 1-3 of its MOTION TO DISMISS. Further, Respondent is correct in asserting that the state and city laws formed independent bases for the judgment in the opinion of the court below, and such judgment would have been the same without regard to federal statutes.

This does not mean, however, that the judgment rests upon "adequate non-federal *grounds*," as Respondent argues, because federal questions as to the unconstitutionality of such local laws were raised by Petitioner. It is submitted that Respondent has misconceived the meaning of Rule 16 of this Honorable Court in assuming that "non-federal bases" means "non-federal" statutes.

It is precisely *because* the court below rested its decision upon such local statutes and ordinances which, as so construed, are unconstitutional, that Petitioner herein asserts its right of appeal.

IV. Petitioner challenges statements made by Respondent asserting that Petitioner's Insurance carrier is the only true party at interest herein.

The references on page 21 of the Motion to Dismiss are not only de hors the record, and irrelevant, but are

scandalous attempts improperly to influence this Honorable Court. Further, the truth thereof is specifically denied, and counsel for Petitioner insists that they are conscientiously representing solely the interests of the Petitioner exterminating company herein.

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By_____
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PROOF OF SERVICE

I, John D. Richardson, one of the attorneys for Orkin Exterminating Company, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of October, 1963, I served copies of the foregoing Reply Brief upon the following:

1. On Gulf Coast Rice Mills, Appellee, by depositing same in a United States mail box with first class postage prepaid, addressed to Carnes & Martin, counsel of record for such Appellee, at their last known post office address at Bank of the Southwest Building, Houston, Texas.

_____
John D. Richardson